182 (13)

No. 10-776

In The
Supreme Court of the United States

Anh "Joseph" Cao and the
Republican National Committee, *Petitioners*

v.

The Federal Election Commission, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Reply to Brief in Opposition

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Reasons to Grant the Petition

The petition for a writ of certiorari presents an open question that this Court expressly reserved in *Colorado Republican Federal Campaign Committee v. FEC*. *See* 533 U.S. 431, 456 n.17 (2001) ("*Colorado-II*"). *See also id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting). That open question is whether a political party's "expenditures" that contain a party's "own speech" may be treated as "contributions" if they are coordinated with the party's candidate, including whether the coordination is *de minimis* (e.g., only as to timing). The petition clearly presented this open question and offered three tests for determining where the necessary "own speech" line should be drawn. Pet. 19-22. That open question is based on the foundational distinction in *Buckley v. Valeo*, 424 U.S. 1 (1976), between "expenditures" (funding one's *own* speech) and "contributions" (funding *another's* speech). *Id.* at 19-23. *See* Pet. 16-19.

Yet FEC's opposition ignores *Buckley*'s foundational distinction. Failing to address the core issue, FEC also fails to refute Petitioners' showing (I) that the open question is an important, unresolved question that this Court should resolve and (II) that the decision below conflicts with *Buckley* and *Colorado-II*.[1]

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[1] FEC agrees that this case is not moot as to Republican National Committee ("RNC"), but "is unaware" as to Petitioner Cao's plans to run for office again and argues that "[i]f Cao has no such intent, the case is moot with respect to him." Opp'n 3 n.1. This issue need not be considered because the case is not moot as to RNC. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003) ("(FEC) has standing, and

I. Whether a Party's "Own Speech" May Be Treated as a Contribution Is an Open Question Requiring this Court's Resolution.

FEC's opposition makes three central errors: (A) it fails to even address *Buckley*'s distinction between "expenditure" and "contribution" that is the core issue in this case; (B) though acknowledging that *Colorado-II* left open the "possibility" of an as-applied challenge, Opp'n 13, it refuses to recognize that the open question focused on "*own speech*" and the implications of that line; and (C) it tries to make this case facial because Petitioners provided a test for where "own speech" protection should begin. These errors are considered next.

A. The Open Question Involves *Buckley*'s "Expenditure" Versus "Contribution" Distinction.

The open question presented goes to the foundation of this Court's campaign-finance jurisprudence in *Buckley*. There, this Court applied strict scrutiny to reject *expenditure* limitations because they "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19.

But, according to *Buckley*, *contributions* "entail only a marginal restriction" on speech. *Id.* at 20. Contributions are but "general expression[s] of support for the

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therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's.") *See also Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003) ("A candidate plaintiff no more has a duty to run in every election . . . to keep his suit alive than an abortion plaintiff has a duty to become pregnant again at the earliest possible opportunity . . . . Politicians . . . often wait years before running again; obviously this doesn't show they're not serious about their political career.").

candidate and his views" without "communicat[ing] the underlying basis for the support." *Id.* at 21. Contribution limits do not decrease contributors' speech because contributions are a mere "undifferentiated, symbolic act." *Id.* Contribution limits "thus involve[] little direct restraint on . . . political communication. *Id.* And *Buckley*'s key is that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the *transformation* of contributions *into political debate involves speech by someone other than the contributor*." *Id.* at 21 (emphases added). Under *Buckley*'s general principles, limits are permissible for undifferentiated, symbolic, indirect speech.[2]

But the *Cao Ad* does not fit that description. *See* Pet. 6. It states the underlying basis for supporting Cao. It is RNC's own, direct speech. Because RNC was prohibited from airing it, there was a "substantial rather than merely theoretical restraint[] on the quantity and diversity of political speech," 424 U.S. at 19. A speech "expenditure" was restricted, not some indirect, symbolic support for Cao.

Buckley's foundational analysis was the basis for the reference made in *Colorado-II* regarding the unresolved question of whether a party's coordinated expenditure for a communication containing its own speech could be treated as a contribution. 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). *Buckley*'s fundamental distinction and the First Amendment preclude limiting one's own speech as a contribution.

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[2] In *Colorado-II*, three Justices expressed the opinion that *Buckley* was wrong in failing to provide full, strict-scrutiny First Amendment protection to contributions. 533 U.S. at 465 (Thomas, J., joined by Scalia & Kennedy, JJ.).

But FEC's opposition is silent on this foundational analysis and core issue.

B. The Open Question Involves an "Own Speech" Line, with All Included Implications.

FEC concedes that *Colorado-II* left open "the possibility that FECA's limits on party coordinated expenditures might be unconstitutional in some applications." Opp'n 13. But it tries to evade the core issue by arguing that (1) *Colorado-II* actually foreclosed as-applied challenges based on the "own speech" formulation that it expressly left open because doing so might protect considerable speech and (2) Petitioners' decision to propose an "own speech" test forecloses an as-applied challenge. Opp'n 11-18. The first argument is answered here, the second in Part I.C.

The open question involves an *own-speech line* for distinguishing between unlimited "expenditures" and permissibly limited "contributions." This was clearly stated in *Colorado-II*, which said it did reach the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. 441a(d)(2)-(3), as applied to communications "involv[ing] more of the party's *own speech*," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17 (emphasis added).

Since the open question involves an *own-speech* line, it necessarily involves *all the implications* of an "own speech" line, i.e., the full scope of communications constituting a party's "own speech." If considerable speech will be protected by an own-speech line, that likelihood was within the expectation of this Court when leaving open the own-speech question and is a compelling reason for protecting "own speech." If considerable core political speech is constitutionally protected but currently restricted, protecting it is

urgent. Consequently, it is no answer for FEC to say that this as-applied, own-speech challenge is foreclosed because considerable speech would be protected.

Yet that is what FEC argues when it asserts that an own-speech challenge is essentially facial, "directly at odds with the core rationale of *Colorado II*," Opp'n 11, and "'exceedingly broad,'" Opp'n 13 (citation omitted). FEC's effort to dodge the implications of the own-speech open question by asserting that it might reach considerable speech and that *Colorado-II* forecloses such an as-applied challenge is exactly the sort of argument that this Court rejected in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"). *See* Pet. 14-15. FEC's effort to distinguish *WRTL-I* on the basis that WRTL challenged the electioneering-communication prohibition as applied to "three specific advertisements" and "'materially similar' ones," Opp'n 17 (citation omitted), is a distinction without a difference because here Petitioners challenge the treatment of coordinated own-speech expenditures as contributions as applied to a specific advertisement and materially similar ones. And the notion that this as-applied challenge is really facial because it merely involves "reassertion of arguments previously rejected by this Court," Opp'n 17, blatantly ignores the own-speech question, expressly left open, to which the arguments are directed.

FEC's evasion is evident in some selective quoting that ignores the "own speech" nature of the open question and implies that "although . . . *Colorado II* acknowledged the possibility" of an as-applied challenge, it already decided that party coordinated spending "'covers a spectrum of activity'" beyond just paying a candidate's bills. Opp'n 13 (quoting *Colorado II*, 533 U.S. at 445). But what *Colorado-II* did "not reach" was

the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. 441a(d)(2)-(3), as applied to communications "involv[ing] more of the party's *own speech*," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17 (emphasis added). So the contrast is between a party's "own speech" and mere "payment of the candidate's bills." But FEC ignores that distinction and the "own speech" formulation of that open question, arguing that "the Court did not suggest that the *permissible* applications are limited to 'paying the candidates' bills." Opp'n 13 (emphasis in original; citation omitted). In fact, from the actual *Colorado-II* statement quoted above, 533 U.S. at 456 n.17, that limitation is entirely possible, though not yet decided. The analytical key when the issue is decided, as it should be here, is whether the proposed speech is the party's "own speech."

FEC's quote, *supra*, about party coordinated spending "cover[ing] a spectrum of activity,'" Opp'n 13 (quoting *Colorado-II*, 533 U.S. at 445), is far removed from the context of this Court's discussion in *Colorado-II* of the issue it was leaving open. FEC's use of this quote out of context and for the purpose FEC uses it is misleading. In context, its meaning is clear:

> The principal opinion in *Colorado I* noted that coordinated expenditures "share some of the constitutionally relevant features of independent expenditures." 518 U.S., at 624. But it also observed that "many [party coordinated expenditures] are . . . virtually indistinguishable from simple contributions." *Ibid.* Coordinated spending by a party, in other words, covers a spectrum of activity, as does coordinated spending by other political actors.

533 U.S. at 444-45 (ellipsis in original). The first two

sentences identify the distinction in kinds of coordinated expenditures that this Court recognized in leaving open the own-speech question, while the third sentence is descriptive of party coordinated expenditures in general, not prescriptive of regulable speech. FEC's selective quotation does not show that *Colorado-II* already decided that "own speech" expenditures could be treated as contributions

C. Providing a Logical "Own Speech" Line Does Not Make this Challenge Facial.

FEC attempts to portray this challenge as facial because Petitioners argue that the best way to identify "own speech" is identifying speech "attributable" to speakers. Opp'n 13. But Petitioners challenge the treatment of a coordinated expenditure for the *Cao Ad* and materially similar communications as unconstitutional for treating such communications as contributions when they contain RNC's *own speech*. So *Colorado-II*'s open question and this as-applied challenge are as to *own speech* communications. Nowhere does FEC argue that the *Cao Ad* is not RNC's own speech, so under any definition of "own speech" the Ad may not be treated as a contribution.

But how should "own speech" be defined? A holding that own-speech expenditures for coordinated communications may not be treated as contributions would be welcome, but of limited usefulness without guidance on what constitutes "own speech." For example, if this Court were to use a "functionally identical to contributions" test for identifying non-own-speech expenditures, 533 U.S. at 468 & n.2 (dissent), it would be left with a test like the "functional equivalent of express advocacy" test, which this Court construed with the "appeal to vote" test in *FEC v. Wisconsin Right to Life*,

551 U.S. 449, 469-70 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.), and ultimately abandoned in *Citizens United v. FEC* because of the FEC's conversion of that "objective . . . test" into a prolix, subjective, balancing test. 130 S. Ct. 876, 895 (2010).

So Petitioners have proposed a test for determining when speech is one's own (i.e., is it *attributable* to the speaker?), and the dissents have proposed other lines. Pet. 19-22. A test for "own speech" is necessary, of course, if "own speech" is indeed protected by the First Amendment as *Colorado-II* suggests it might be, but FEC proposes no better test than those proposed, nor even real critiques of Petitioners' test (other than that much speech would be protected), instead rejecting the whole enterprise.

The "own speech" formulation is directly from *Colorado-II*, and is partly defined there by what it is contrasted to, i.e., contributions "involv[ing] more of the party's *own speech*," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17 (emphasis added). The definition of "own speech" is also informed by the many descriptions in *Buckley* of the difference between "expenditures" (direct speech) and "contributions" (indirect speech). *See supra* Part I.A.. For reasons briefly set out in their petition, Petitioners believe that whether speech is "attributable" to a speaker is a good test for whether it is the speaker's "own speech." Where the line is to be drawn is something to debate in merits briefing and to be decided by this Court. But the fact that the Petitioners have proposed a defensible line as part of their analysis is a reason to grant the petition, not deny it. If Petitioners' line reaches broadly it is because the "own speech" concept is broad, and this Court left the "own speech" question open despite the broad implications of

that test. In any event, if the First Amendment requires protection of "own speech" coordinated expenditures from contribution limitations, then the breadth of "own speech" matters not. The Constitution must be followed. And the test will be ultimately drawn by this Court, regardless of what test Petitioners propose.[3]

D. Petitioners Preserved a Narrow Issue as to the Coordination of the *Cao Ad*.

As set out in the petition, Pet. (i), 8-9, 15, Petitioners not only challenge the treatment of RNC's planned expenditures for its own speech in the *Cao Ad* on an own-speech basis but also on a *de minimis* coordination basis. It is undisputed that the scope of coordination is only significant if the *Cao Ad* is not protected solely based on its nature as RNC's "own speech."

FEC argues that the coordination was not only as to timing but also as to some content of the *Cao Ad*. Opp'n 7. A meaningful discussion as to timing would necessarily be based on some notion of the *nature* of the ad, and as dissenting Chief Judge Jones argued "after the past several years in litigation Cao would have to admit his awareness of the Ad!" but "[t]iming-only is the only stipulation." App. 52a n.4. In any event, the coordination of the planned (but prohibited) *Cao Ad* was *de minimis*, and such minimal coordina-

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[3] Analogously, in *WRTL-II*, present counsel for Petitioners proposed a test for protecting the three ads at issue from the electioneering communications prohibition, *see* Brief for Appellee at 55-57, *WRTL-II*, 551 U.S. 449 (Nos. 06-969 & 06-970), but despite this proposed test and the FEC's opposition to any such test, the principal opinion adopted the "appeal to vote test" for determining which communications were "the functional equivalent of express advocacy." *WRTL-II*, 551 U.S. at 469-70 (principal opinion).

tion clearly places the ad toward the "end of the spectrum" where "expenditures . . . largely resemble, and should be entitled to the same protection as, independent expenditures," *Colorado-II*, 533 U.S. at 467 (dissent).

More substantively, FEC asserts that "Petitioners affirmatively disavowed an argument that 'the level of coordination should affect whether an expenditure may be regulated.'" Opp'n 13 (citation omitted). FEC attempts to confuse the issues. FEC fails to address the response to its argument already set out in the petition, Pet. 8-9, and so fails to rebut Chief Judge Jones's conclusion there recorded that "'Counsel conceded only FEC's regulatory interpretation of the consequences of timing-only coordination, *not* the constitutionality of that interpretation.'" Pet. 8 n.6 (citation omitted).

Petitioners did preserve a narrow *de minimis* coordination challenge to treating the *Cao Ad* as a contribution. But there are problems with *de minimis* tests, as the Clement dissent noted. App. 83a (Clement, J., joined by Jones, C.J., and Smith & Elrod, JJ., concurring in part and dissenting in part).

In sum, as shown in Part I, the petition presents an important constitutional issue that has not been, but should be, decided by this Court. Sup. Ct. R. 10.

II. The Decision Below Conflicts with *Buckley* and *Colorado-II*.

Because FEC failed to even mention *Buckley*'s foundational distinction between what must be protected as "expenditures" and what may be limited as "contributions," it has failed to rebut Petitioners' showing that the decision below conflicts with *Buckley*, 424 U.S. 1, and with the open "own speech" question preserved in *Colorado-II*, 533 U.S. 431, which was

based on *Buckley*'s "expenditure" versus "contribution" distinction.

Conclusion

For the reasons stated, the petition should be granted.

Respectfully submitted,

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